No. 07-863

FILED
JAN 18 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

GEORGE RAM LAMA,

Petitioner,

v.

FRED MEYER, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CORPORATE DISCLOSURE STATEMENT

Per Sup. Ct. R. 29.6, Respondent Fred Meyer, Inc. provides the following corporate disclosure statement.

Fred Meyer, Inc., is a Delaware corporation which is a wholly-owned subsidiary of The Kroger Co., an Ohio corporation. Fred Meyer Stores, Inc., the operating company, is an Ohio corporation which is a wholly-owned subsidiary of Fred Meyer, Inc. Petitioner George Ram Lama' was employed by the operating company Fred Meyer Stores, Inc. Except as clarified in this corporate disclosure statement, all parties appear in the caption.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Fred Meyer, Inc. ("Fred Meyer" or Respondent) opposes the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The initial memorandum opinion of the United States Court of Appeals for the Ninth Circuit was filed on July 16, 2007. *See* petitioner's appendix at pages 29-30 (his version of the July 16, 2007, opinion is not represented correctly as it was issued). The Ninth Circuit issued a corrected opinion on November 26, 2007. *See* Appendix A to this Opposition at pp. 1a-3a. The decision by the United States District Court for the Western District of Washington was not reported but an incomplete version is in petitioner's Appendix at pp. 19-21, 24-28. A complete version of the district court decision is in Appendix A hereto at pp. 4a-13a.

JURISDICTION

The opinion of the Court of Appeals for the Ninth Circuit was filed July 16, 2007, and a corrected opinion was issued on November 26, 2007. Therefore,

this Court has jurisdiction pursuant to 28 U.S.C. § 1254 and Sup. Ct. R. 13.1.

STATEMENT OF THE CASE

Petitioner Lama alleged national origin discrimination in his first lawsuit against respondent Fred Meyer which he filed on March 24, 2002, in the United States District Court for the Western District of Washington. This suit then was dismissed on January 8, 2004, on Fred Meyer's motion for summary judgment. The Court of Appeals for the Ninth Circuit affirmed the first dismissal in an unpublished memorandum opinion filed February 11, 2005.

After the court of appeals affirmed the dismissal of his first case, on March 9, 2005, petitioner Lama filed a second lawsuit in the United States District Court for the Western District of Washington alleging substantially the same claims against Fred Meyer as those he had alleged in his first suit, which the district court had dismissed and the court of appeals had affirmed.

After considering Fred Meyer's motion for summary judgment, on March 8, 2006, the district court dismissed the claims for national origin and age discrimination in the second lawsuit on *res judicata* grounds (identity of claims, identity of parties, failure to assert, and final judgment on the merits) and lack of subject matter jurisdiction because of failure to exhaust his administrative remedies before the

EEOC. Appendix B, p. 13a. The district court did not address the judicial estoppel or standing arguments. *Id.* The court of appeals affirmed this second dismissal on the same basis, Appendix A, pp. 2a-3a, in its memorandum decision filed July 16, 2007, and then in its corrected opinion issued on November 26, 2007.

REASONS FOR DENYING THE PETITION

This case fails to satisfy the standards set forth in Sup. Ct. R. 10(a) for accepting the writ of certiorari in the exercise of this Court's discretion. First, the decision by the Court of Appeals for the Ninth Circuit is not in conflict with the decision of any other court of appeals, nor does petitioner argue that it is. Second, the petition for writ of certiorari does not clearly set forth the legal questions presented for review by petitioner as required by Sup. Ct. R. 14.1(a).

As petitioner Lama acknowledges, "I consulted with over fifty private attorneys and was unable to find anyone to take my case." Petition at page 6. The EEOC and the Washington State Human Rights Commission told Lama that he had no case. *Id.* at 17. The district court and court of appeals properly concluded that, as a matter of law, Lama had no case. There is no legal issue to be decided by this Court, and certainly no legal issue in conflict with other courts of appeal or of significant public interest.

CONCLUSION

Petitioner Lama's claims have been found to be without merit by the district court in two separate lawsuits, and this lack of merit has been affirmed in two separate decisions by the court of appeals. Petitioner has not raised a clear question meriting review with this Court. The petition for a writ of certiorari should be denied.

Dated this 18th day of January, 2008.

Respectfully submitted,

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APPENDIX A

CORRECTED 11/26/2007+

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GEORGE RAM LAMA, Plaintiff-Appellant, v. FRED MEYER, INC., Defendant-Appellee.	No. 06-35276 D.C. No. CV-05-00385-JCC MEMORANDUM*

Appeal from the United States District Court
for the Western District of Washington
John C. Coughenour, Chief District Judge,
Presiding

Submitted July 9, 2007**

Before: LEAVY, THOMAS, and BERZON,
Circuit Judges.

George Ram Lama appeals pro se from the district court's summary judgment in his Title VII action alleging that his former employer, Fred Meyer,

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Inc., discriminated against him based on his national origin and age, and retaliated against him for complaining about harassment. We have jurisdiction under 28 U.S.C. § 1291. We review de novo, *Buono v. Norton*, 371 F.3d 543, 545 (9th Cir. 2004), and we affirm.

The district court properly dismissed Lama's claims of retaliation and discrimination based on his national origin because these claims were considered and rejected in a prior action for failure to establish a prima facie case. +*See Western Radio Servs. Co. v. Glickman*, 123 F.3d 1189, 1192 (9th Cir. 1997) (doctrine of res judicata bars a claim where there is an identity of claims, an identity of parties, and a final judgment on the merits).

The district court properly dismissed Lama's claim of age discrimination because Lama could have raised that claim in his prior action. *See Gregory v. Widnall*, 153 F.3d 1071, 1074 (9th Cir. 1998) (per curiam) (barring under res judicata "all grounds for recovery which could have been asserted, whether they were or not, in a prior suit between the same parties on the same cause of action.") (internal quotations omitted).

To the extent Lama's complaint alleges that defendants discriminated against him in 2004, the district court properly dismissed this claim for lack of subject matter jurisdiction because Lama did not exhaust his administrative remedies with the Equal Employment Opportunity Commission ("EEOC") as

to any conduct alleged to have occurred after October 2003. *See Lyons v. England*, 307 F.3d 1092, 1103-04 (9th Cir. 2002) (federal subject matter jurisdiction requires a plaintiff to exhaust administrative remedies before seeking adjudication of a Title VII claim by filing a timely charge with the EEOC).

Lama's remaining contention lacks merit.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

GEORGE RAM LAMA, Plaintiff, v. FRED MEYER, INC., Defendant.	CASE NO. C05-385C ORDER

This matter comes before the Court on (1) Defendant's Motion for Summary Judgment (Dkt. No. 14) ("Def.'s Mot."), Plaintiff's responsive documents (Dkt. Nos. 21, 23, 24) ("Pl.'s 1st Opp'n"), Defendant's Reply (Dkt. No. 28) ("Def.'s Reply"), and Plaintiff's objection thereto (Dkt. No. 29) ("Pl.'s 2nd Opp'n"); and (2) this Court's December 21, 2005 Show Cause Minute Order (Dkt. No. 30) and the papers filed in response thereto (Dkt. Nos. 31 ("Pl.'s OSC Resp."), 32 ("Defs.' OSC Opp'n"), and 34 ("Pl.'s OSC Reply")). The Court has considered the papers submitted regarding summary judgment and determined that oral argument is not necessary. The Court hereby finds and rules as follows.

I. BACKGROUND

Plaintiff George Ram Lama is a former employee of Defendant Fred Meyer – Plaintiff worked for

Defendant from August 14, 2000 to March 11, 2004. He is 55 years old and is of Nepalese origin. The instant suit is Plaintiff's second against Defendant. Plaintiff also is a debtor in bankruptcy proceedings in the Western District of Washington, wherein his debts were discharged under 11 U.S.C. § 727. Plaintiff proceeds *pro se* in the instant litigation.

On March 24, 2002, Plaintiff filed a complaint alleging national origin discrimination with the Equal Employment Opportunity Commission ("EEOC") and the Washington State Human Rights Commission ("WSHRC"). This complaint resulted in determinations by both agencies that there was no reasonable cause for Plaintiff's discrimination charge. (*See* Def.'s Mot., Dickens Decl. Exs. 1, 2.) Upon receipt of his right-to-sue letter, Plaintiff filed, in January 2003, an employment discrimination action against Defendant Fred Meyer and its employees (who were later dismissed). (*See* C03-49R, Order (Dkt. No. 17); Def.'s Mot., Dickens Decl. Ex. 3 (C03-49R, Amended Complaint).)

On January 8, 2004, this Court granted Fred Meyer's motion for summary judgment and dismissed all claims against it. (Def.'s Mot., Dickens Decl. Ex. 4 (C03-49MJB, Order).) The Court ruled in the first case that Plaintiff failed to exhaust his administrative remedies as to claims of failure to promote, race/color discrimination, religious discrimination, and political interest discrimination, and therefore the Court had no subject matter jurisdiction to consider such claims. (*Id.*) The Court also granted summary judgment on

the *national origin* discrimination claim, finding that Plaintiff failed to make out a hostile work environment claim. (*Id.*) The Court then ruled on Plaintiff's late-addition *retaliation* claim, finding that the record contained "no evidence showing a causal link between the protected activity and the adverse action," which precluded a *prima facie* case of retaliation. (*Id.* at 8.) Plaintiff appealed, but the Ninth Circuit affirmed the dismissal. (*Id.* Ex. 6.) Defendant was awarded $807.33 in costs in that case on February 5, 2004. (*Id.* Ex. 5.)

Following the final judgment in his first case against Fred Meyer, Plaintiff filed a second complaint with the EEOC and WSHRC on January 22, 2004. (*Id.* Ex. 7.) He again claimed retaliation, relying on facts that occurred before the dismissal of his first case, and again claimed national origin discrimination. (*Id.*) A new claim was made regarding *age* discrimination as well, though the acts alleged to support this charge also fell between June 1, 2003 and October 24, 2003 – a period completely within the pendency of his first action (which began on January 10, 2003 and was dismissed on January 8, 2004). (*Id.*)

While that discrimination complaint was pending before the EEOC, Plaintiff filed a Chapter 7 bankruptcy petition on March 9, 2004. (*Id.* Ex. 9 (04-13139KAO, Petition, Schedules, and Statements).)[1]

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[1] Plaintiff was represented by an attorney in the bankruptcy matter. (*Id.*) The bankruptcy petition included references

(Continued on following page)

On June 16, 2004, Plaintiff's debts were discharged. (*Id.* Ex. 10 (04-13139KAO, Discharge of Debtor).) Thereafter, the EEOC dismissed Plaintiff's second complaint, again unable to find a violation; Plaintiff's second right-to-sue letter was dated January 6, 2005. (*Id.* Ex. 8.) On March 9, 2005, a year after he had filed for bankruptcy, Plaintiff initiated the instant civil action alleging employment discrimination against Defendant, seeking "$1.4 million or Back pay, future pay and Punitive damages." (Complaint (Dkt. No. 1).) Specifically, Plaintiff now seeks damages for failure to promote, harassment/profiling, retaliation, race/color discrimination, national origin discrimination, and age discrimination. (*Id.*)

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to Plaintiff's costs debt from his first lawsuit against Defendant (*see id.* (Schedules B, C; Statement of Financial Affairs)), but the petition did *not* contain any information about the then-active investigation on Plaintiff's second charge of discrimination with the EEOC or any possible cause of action against Defendant (*id.* (Statement of Financial Affairs)). Specifically, the Statement of Financial Affairs instructed the debtor to "[l]ist all suits and administrative proceedings to which the debtor is or was a party within **one year** immediately preceding the filing of this bankruptcy case." (*Id.*) The only proceeding listed in response was the taxation of costs for Plaintiff's first lawsuit against Defendant. No mention was made of the open EEOC proceeding. Nor was the possible claim against Defendant listed as an "asset" anywhere else on the petition.

II. ANALYSIS

A. Summary Judgment Standard

Rule 56 of the Federal Rules of Civil Procedure governs summary judgment motions, and provides in relevant part, that "[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). In determining whether an issue of fact exists, the Court must view all evidence in the light most favorable to the non-moving party and draw all reasonable inferences in that party's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-50 (1986); *Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir. 1996). A genuine issue of material fact exists where there is sufficient evidence for a reasonable factfinder to find for the non-moving party. *Anderson*, 477 U.S. at 248. The moving party bears the burden of showing that there is no evidence which supports an element essential to the non-movant's claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Once the movant has met this burden, the non-moving party then must show that there is in fact a genuine issue for trial. *Anderson*, 477 U.S. at 250. Thus, the inquiry on a motion for summary judgment is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251-52.

B. Issues on Summary Judgment

Defendant seeks dismissal of all claims against it on three grounds. First, Defendant argues that Plaintiff's suit is barred by the doctrine of judicial estoppel because Plaintiff failed to notify the bankruptcy court of his possible causes of action against Defendant – the theory is that Plaintiff should not be allowed the double benefit of having had his debts discharged without regard for the value of the instant claims (which he knew about before filing for bankruptcy) while now being allowed to pursue those claims debt-free and outside bankruptcy proceedings. Second, Defendant argues that Plaintiff does not have standing to bring the claims in this suit in any event, because he had a duty to disclose the claims to the bankruptcy court, did not do so, and as a result of that failure, the bankruptcy trustee is the real party in interest. Third, Defendant argues that *res judicata* bars Plaintiff's current suit altogether. Because the *res judicata* argument is dispositive, as discussed below, the Court need not reach the standing or judicial estoppel arguments.

C. *Res Judicata* and Subject Matter Jurisdiction

In general, the doctrine of *res judicata* bars a second suit on the same claim or on different claims arising from the same facts. Thus, the bar reaches both grounds of recovery that were asserted and those that were not asserted but could have been.

Int'l Union of Operating Eng'rs v. Karr, 994 F.2d 1426, 1429 (9th Cir. 1993). The 3-part test for *res judicata* asks whether the earlier suit "'(1) involved the same "claim" or cause of action as the later suit, (2) reached a final judgment on the merits, and (3) involved identical parties or privies.'" *Mpoyo v. Litton Electro-Optical Systems*, 430 F.3d 985, 987 (9th Cir. 2005) (quoting *Sidhu v. Flecto Co.*, 279 F.3d 896, 900 (9th Cir. 2002)).

As to the first element ("same claim"), the Court must consider the following factors: (a) "whether the two suits arise out of the same transactional nucleus of facts"; (b) "whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action"; (c) "whether the two suits involved infringement of the same right"; and (d) "whether substantially the same evidence is presented in the two actions." *Id.* (citing *Chao v. A-One Med. Servs., Inc.*, 346 F.3d 908, 921 (9th Cir. 2003)). Whether the two suits arise out of the same "transactional nucleus of facts" is considered the most important of the foregoing factors, often becoming "outcome determinative" as to the first *res judicata* element. *Mpoyo*, 430 F.3d at 988.

The "nucleus of facts" factor is significant in this case. Plaintiff's claims here, as in his prior lawsuit, center on Defendant's conduct regarding "profiling," suspending, refusing to promote, and assigning certain work to Plaintiff. The period of time in which these events allegedly occurred (according to the EEOC complaint underlying the instant suit) ends in

October 2003, which is prior to the dismissal of Plaintiff's first suit. Thus, Plaintiff clearly could have raised all of his claims in the first lawsuit, either with the EEOC or with the Court.

This Court had no subject matter jurisdiction in the first lawsuit to consider claims on the merits that were not raised properly before the EEOC prior to commencing the first lawsuit. These included the claims for failure to promote, race/color discrimination, religious discrimination, and political interest discrimination. However, this Court did consider the national origin and retaliation claims on the merits, granting summary judgment for Defendant because Plaintiff could not make out the basic elements of those claims. Thus, the only claim at issue here that was *not* addressed by the Court in the first lawsuit is the *age* claim that Plaintiff now raises. However, here too, Plaintiff fails to raise a genuinely new claim, because the age discrimination claim arises out of the same nucleus of facts and period of conduct as all of the other claims from the first lawsuit. Plaintiff could have raised the age claim in the first lawsuit, but he did not do so. Therefore, *all* conduct alleged in the instant suit that occurred prior to October 2003 already was litigated or could have been litigated in Plaintiff's first lawsuit.

Plaintiff's attempt to escape the "nucleus of facts" test by characterizing his current retaliation and failure-to-promote claims as involving "new" conduct occurring in 2004 (*i.e.*, after October 2003) (Pl.'s OSC Resp. 3-4) fails because he has not exhausted his

administrative remedies as to conduct after October 2003. The EEOC complaint underlying the instant suit makes no mention of conduct after October 2003 (*see* Def.'s Mot., Dickens Decl. Ex. 7), so this Court lacks subject matter jurisdiction to consider any claim based on any conduct in 2004. *Lyons v. England*, 307 F.3d 1092, 1103 (9th Cir. 2002); *B.K.B. v. Maui Police Dep't*, 276 F.3d 1091, 1099 (9th Cir. 2002).

The foregoing "nucleus of facts" inquiry favors a finding that the current suit involves the "same claim" as the prior suit. The other relevant factors favor such a finding as well. First, Plaintiff's current suit involves claims about rights that already have been determined – this Court's determination that Defendant could not be held liable for national origin discrimination or retaliation in the prior lawsuit would be "destroyed" if the present suit is allowed to continue. Second, the "same rights" are raised here as before, with the exception of the age claim (which should have been joined before) and the post-October 2003 claims (over which this court lacks jurisdiction). Finally, as to the claims involving pre-October 2003 conduct, the "same evidence" presented here also was presented (or could have been presented) in the prior lawsuit and/or in the prior administrative proceeding.

Considering all four factors going to the "same claim" element of the *res judicata* test, the Court finds that, to the extent that the underlying conduct extends through October 2003, Plaintiff's current suit does involve the "same claim" as his prior lawsuit. Any such claim that was not actually brought in

the first lawsuit *could have been brought* therein. Further, regarding conduct after October 2003, this Court lacks subject matter jurisdiction due to Plaintiff's failure to exhaust administrative processes.

The second and third elements of the *res judicata* test are satisfied here as well. As to the second element, summary judgment dismissal of the first suit generally "is considered a decision on the merits for *res judicata* purposes." *Mpoyo*, 430 F.3d at 988 (citing *Hells Canyon Pres. Council v. U.S. Forest Serv.*, 403 F.3d 683, 686 (9th Cir. 2005)). Any claims administratively raised in the current suit were capable of being brought in the first suit that was dismissed with prejudice. Likewise, the third element – identical parties – is established, because both Plaintiff and Defendant were in identical postures in the prior litigation.

For the foregoing reasons, all of Plaintiff's claims depending on conduct that occurred through October 2003 must be dismissed under the doctrine of *res judicata*, and all of Plaintiff's claims depending on conduct that occurred after October 2004 must be dismissed for lack of subject matter jurisdiction. Viewing the facts in the light most favorable to Plaintiff, it is clear that he has failed to raise any genuine issue of material fact that would preclude dismissal of his claims as a matter of law. Because no claims can survive the *res judicata* and subject matter jurisdiction inquiries, the Court need not

address Defendant's judicial estoppel or standing arguments.[2]

III. CONCLUSION

Defendant's motion for summary judgment is GRANTED for the reasons set forth in section II.C of this Order.

SO ORDERED this 8th day of March, 2006.

/s/ _____
John C. Coughenour
United States District Judge

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[2] Furthermore, Defendant's alternative request for a stay in this matter pending payment by Plaintiff of costs ordered in the first lawsuit against it is MOOT, as Plaintiff now has paid the $807.33 cost bill in full. (*See* Notice (Dkt. No. 25); Payment (Dkt. No. 26); Def.'s Reply.)